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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 484

MICHAEL CARBONE AND LOUIS MACCHIARELLI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1967 (2 R. 62).[1] A petition for rehear-

[1] "R." refers to the portions of the record, in two volumes, which were reproduced as appendices to the briefs in the court of appeals. The proceedings in the court of appeals are appended to the second of the volumes. "Tr." refers to the original transcript of record.

ing was denied on June 15, 1967 (2 R. 73). On July 6, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari until August 14, 1967, and the petition was filed on August 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an inconsistency in the jury's verdict convicting petitioners of having conspired to violate the narcotics laws and acquitting them of an alleged substantive narcotics offense was fatal to the validity of the conspiracy conviction.

STATEMENT

Count 1 of a two-count indictment (1 R. 1-3), filed in the United States District Court for the Southern District of New York, charged that petitioners and a codefendant, William Lowe, on or about July 6, 1964, received, concealed, and sold, and facilitated the transportation, concealment, and sale of, approximately 3.600 grams of heroin hydrochloride, a narcotic drug, knowing it to have been unlawfully imported into the United States, in violation of 21 U.S.C. 173 and 174. Count 2 charged that the same defendants conspired to violate these statutory provisions. The conspiracy was alleged to have been entered into on or about January 1, 1964, and to have continued to and including the date of the indictment's return (October 2, 1964). It was alleged to be part of the conspiracy that the defendants would receive, conceal, buy, and

sell, and facilitate the transportation, concealment, and sale of, "a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown", knowing the drugs to have been unlawfully imported. Following a joint jury trial, petitioners were found not guilty on count 1 and guilty on count 2.[2] On August 11, 1966, each petitioner was sentenced to the mandatory minimum penalty of five years' imprisonment (Tr. 599-600). The court of appeals affirmed (Pet. App. A).

1. The government's evidence was presented through Federal Narcotics Agent Jack Peterson, "Cadillac Willie" Lowe (the codefendant whose case had been severed, see note 2), and two other narcotics agents, who had conducted surveillances of certain relevant activities. In summary their testimony was as follows:

On July 6, 1964, Agent Peterson, acting in an undercover capacity, was introduced to Lowe as "Bob from Baltimore", an interested buyer of good-quality heroin (2 R. 1-2). Lowe said that he and his associates could supply Peterson with heroin at $3600 per quarter-kilogram (2 R. 2-3). Peterson told Lowe that it would be necessary for him to sample Lowe's product before a sale could be effected (2 R. 2). Lowe at first refused to supply a sample, but at Peterson's insistence agreed to communicate with his "people" and

[2] The case against Lowe was severed prior to trial. Following the trial—at which he testified on behalf of the government—Lowe pleaded guilty to a violation of 26 U.S.C. 4704(a) and 7237 for his participation in the transactions about which he testified.

to meet Peterson later that evening at a bar on East 139th Street, in the Bronx (2 R. 3-4).

Following a telephone conversation with petitioner Macchiarelli, Lowe drove to the bar, parked his Cadillac and entered Peterson's already parked car for a short conversation. He then went into the bar and again phoned Macchiarelli. He returned to Peterson's car to tell him that the requested sample would arrive shortly (2 R. 4-5, 31-36). Soon afterward petitioners drove up to the bar in an Oldsmobile (with Carbone at the wheel) and Macchiarelli got out and placed a sample of heroin in Lowe's Cadillac (2 R. 6-8, 10-16, 37-39).[3] During Macchiarelli's absence from the Oldsmobile, Lowe entered that vehicle and discussed the technique of sample-giving with Carbone. He later discussed the question of price and delivery with both petitioners (2 R. 37-38). Returning to Peterson's car, Lowe pointed to petitioners and said that "these were his people" (2 R. 8-9). Following petitioners' departure, Lowe went to his automobile, retrieved the sample, gave it to Peterson, and asked Peterson to call him at the bar after he had tested it (2 R. 9-10, 39-40). Peterson did this, expressing satisfaction with the quality but complaining about the price (2 R. 10-11, 17).

The following evening, July 7, after a talk between Lowe and Macchiarelli, Peterson met Lowe at the bar and advised him that he was $1500 short on the

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[3] It was stipulated that a chemist employed by the government would testify that the sample contained 3.600 grams, partly heroin (Tr. 361-364).

agreed price of $3600 for a quarter-kilo of heroin but that he expected to have the money by midnight (2 R. 18-21, 42-43). Carbone drove up a short while later and Lowe informed him of the $1500 shortage (2 R. 21-23, 49). Carbone reported this to Macchiarelli at a bar on 152d Street; in his conversation with Macchiarelli, which was overheard by Agent Frank Selvaggi, Carbone, in reply to an inquiry by Macchiarelli as to whether "they" were "ready to move", said, "No, the guy from Baltimore is 1500 short" (2 R. 49-50).

At about midnight, Peterson and Lowe again met at the East 139th Street bar, where Peterson told Lowe that he had received the $1500 and was ready to do business (2 R. 23). Shortly after midnight, petitioners drove up to the bar. Lowe went to the car and told them that Peterson had the money and was ready to make the purchase (2 R. 23-24, 45-46). With Lowe acting as intermediary petitioners insisted that Peterson surrender the purchase money prior to delivery of the heroin. Peterson refused to agree to this and the transaction was aborted (2 R. 24-26, 47-48).

Petitioners, testifying in their own behalf, admitted their meetings with Lowe, but insisted that all of their conversations—including the one overheard by Agent Selvaggi—related to a proposed purchase by them of transistor radios (Tr. 374-397, 401-420).

2. The trial court instructed the jury that, to convict on count 1, it was not necessary that it find that petitioners had done all of the things which the count charged them with doing—*i.e.*, that they had received,

concealed, and sold, and facilitated the transportation, concealment, and sale of, the narcotics referred to in that count—but that it would suffice if they found that, with the requisite knowledge and intent and on about the date specified, they had done any of the things referred to (1 R. 16-17, 18-19). The court further instructed the jury, with respect to each count, in accordance with the terms of 21 U.S.C. 174,[4] that a finding that petitioners had possessed the narcotics in evidence, either actually or constructively, would suffice to warrant conviction unless the possession was explained to its satisfaction (1 R. 19-21, 27-28). The court also instructed, without objection, that each count of the indictment was to be considered separately and that a finding of guilt on either count

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[4] 21 U.S.C. 174 relevantly provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> * * * *

did not automatically require that the same finding be made as to the other (1 R. 18, 42-43).

ARGUMENT

Petitioners' only contention is that their conviction on the conspiracy count was fatally inconsistent with their acquittal on the substantive count (Pet. 11-15).

As petitioners recognize (Pet. 2, 14), it has been settled since *Dunn* v. *United States*, 284 U.S. 390, that "Consistency in the verdict is not necessary" (at 393). See, *e.g.*, *United States* v. *Andreadis*, 366 F. 2d 423, 435 (C.A. 2), certiorari denied, 385 U.S. 1001; *United States* v. *Kahn*, 366 F. 2d 259, 262 (C.A. 2), certiorari denied, 385 U.S. 948; *Coil* v. *United States*, 343 F. 2d 573, 576 (C.A. 8), certiorari denied, 382 U.S. 821; *Rua* v. *United States*, 321 F. 2d 140, 143 (C.A. 5), certiorari denied, 377 U.S. 969; *United States* v. *Marcone*, 275 F. 2d 205, 206 (C.A. 2), certiorari denied, 362 U.S. 963; *United States* v. *De Lucia*, 262 F. 2d 610, 616 (C.A. 7), certiorari denied, 359 U.S. 1000; *Bryson* v. *United States*, 238 F. 2d 657, 663 (C.A. 9), certiorari denied, 355 U.S. 817. And see *United States* v. *Dotterweich*, 320 U.S. 277, 279. Petitioners' reliance on *Sealfon* v. *United States*, 332 U.S. 575 (Pet. 14), is misplaced. That case held that the doctrine of *res judicata* operates to conclude, in one criminal trial, matters determined by the verdict in a former trial, though the offenses charged be different. It has no relevance to inconsistent verdicts simultaneously rendered by a single jury at a single trial. *United States* v. *King*, 373 F. 2d 813, 815

(C.A. 2); *United States* v. *Marcone*, *supra*, 275 F. 2d at 206. As Judge Hand observed in *Steckler* v. *United States*, 7 F. 2d 59, 60 (C.A. 2) (quoted with approval in *Dunn*, 284 U.S. at 393), the most that can be said where a jury renders an inconsistent verdict

> is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.[8]

Were the rule otherwise, as the court below observed, "the Government would be entitled to have the jury warned that an acquittal on some counts might undermine a guilty verdict on others—almost the op-

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[8] In concluding, in *Dunn*, that inconsistency in the verdict is not necessarily fatal to an otherwise valid conviction, the Court remarked that "Each count in an indictment is regarded as if it was a separate indictment" and that "If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other" (284 U.S. at 393). The latter proposition was essentially that which *Sealfon* later rejected. However, that the *res judicata* analogy was not essential to the *Dunn* decision appears from the Court's immediately subsequent reference to the *Steckler* decision (and its independent rationale) and to its citation (*ibid.*) of *Horning* v. *District of Columbia*, 254 U.S. 135, whose only relevance, as the court below notes (Pet. App. A 5, n. 5), was its reference to the jury's "power to bring in a verdict in the teeth of both law and facts" (254 U.S. at 138).

posite of the standard instruction, which is obviously beneficial to criminal defendants, and which the judge gave here without objection" (Pet. App. A 6-7).

Petitioners contend, however, that the verdict here must have been the result of compromise and should be set aside for that reason. But it is possible that the jury erred in petitioners' favor in applying the law to the facts of this case. Thus, the jury might have believed that while possession of the sample of heroin was sufficient to give rise to the presumption of illegal importation and knowledge thereof, something more than possession was necessary to a finding that that petitioner "received", "concealed", "transported" or "facilitated the transportation" of the heroin sample. See 1 R. 16-21.

In any event, the argument that an inconsistent verdict should be overturned because it may have been the result of compromise was expressly rejected in both *Steckler* and *Dunn*, Mr. Justice Holmes stating in *Dunn*:

> That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.

284 U.S. 390, 394; see *Steckler* v. *United States*, *supra*, at 60.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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